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In the Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

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1. Respondents argue that petitioners' motion under Federal Rule of Civil Procedure 60(b) cannot be used as a vehicle to grant petitioners relief from the injunction entered by the district court in this case because *Aguilar* v. *Felton*, 473 U.S. 402 (1985), has never been overruled by this Court, and because the separate opinions joined by five Justices in *Board of*

Education of Kiryas Joel Village School District v. *Grumet*, 512 U.S. 687 (1994), do not constitute a "change in the law" that would warrant relief from the judgment. Resp. Br. 16-19. We agree that *Aguilar* has not been overruled, and that *Kiryas Joel* itself was not a "change in the law" warranting a grant of relief from the injunction by the district court; the lower courts were obliged to deny relief from the injunction, since they were bound, under the doctrine of *stare decisis*, by this Court's directly controlling precedent in *Aguilar*. But while those points confirm that the lower courts below could not depart from *Aguilar*, they do not answer the question whether *this* Court may overrule its decision on review of the denial of petitioners' Rule 60(b) motion.

The relevant doctrinal constraints on this Court's reconsideration and overruling of its earlier decision —and indeed the constraints on any federal court of appeals that might similarly be asked in the future to reconsider a ruling that provides the legal basis of a permanent injunction with prospective effect—are found not in Rule 60(b) but rather in *stare decisis* and law of the case. Assume, for example, that a district court enters a permanent injunction against the enforcement of a statute based on directly controlling court of appeals precedent in its circuit, and also denies a Rule 60(b) motion based on the same precedent, and that the denial of the Rule 60(b) motion is then appealed. Assume further that, during that appeal, this Court, or the court of appeals en banc, rules in a different case that the statute (or a closely similar one) is constitutional and may be validly enforced. The court of appeals reviewing the district court's denial of relief under Rule 60(b) would surely be authorized to vacate the injunction, even though

the district court's denial of the Rule 60(b) motion was proper and not an "abuse of discretion" at the time the motion was denied.[1]

Amici suggest that another school district or the Secretary of Education might have sought relief from judgment in some other case that is directly controlled by *Aguilar* but was not litigated all the way to this Court. See Council on Religious Freedom, *et al.*, Br. 28-30. Even if that is true, that should not prevent New York City from invoking Rule 60(b) to seek and obtain relief on its own behalf in this case. In another case that was litigated to final judgment or settled by a consent decree, but was not litigated to this Court, the parties would also have to invoke Rule 60(b) to seek relief from the judgment; in those cases as well the lower courts would be bound by *Aguilar* and forbidden to grant relief until and unless this Court had overruled *Aguilar*.[2]

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[1] Similarly, a court of appeals reviewing the grant or denial of a preliminary injunction may decide *de novo* the controlling legal issues in the case, even though the general standard of review of grants and denials of preliminary injunctions is "abuse of discretion." This Court has observed that the usual "abuse of discretion" standard of appellate review in such cases is only "a rule of orderly judicial administration, not a limit on judicial power." *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986). Cf. *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion), *id.* at 16 (Stewart, J., concurring in judgment) (reversing grant of preliminary injunction based on rejection of lower courts' interpretation of First Amendment).

[2] Respondents argue (Br. 19-20 n.5) that Rule 60(b)(6) cannot be a vehicle for relief from judgment in this case, because (they maintain) Rule 60(b)(5) limits the courts' authority to granting relief from judgment based on changes in the law that have *already* occurred, and thereby exhausts the courts'

A motion for relief under Rule 60(b) is therefore an appropriate vehicle for this Court to reconsider its earlier decision in this case. Whether the Court should overrule that decision turns on the doctrines of *stare decisis* and law of the case. Concerning *stare decisis*, when this Court has in the past reconsidered a decision, the Court has examined that decision's conformity with the general thrust of the Court's jurisprudence in the same area. Thus, last Term, when the Court reconsidered and overruled *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), the

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power to grant relief based on any change in the law, past or anticipated. Rule 60(b)(5), however, authorizes the courts to grant relief from judgment when "it is no longer equitable that the judgment should have prospective application," and this Court has the authority to determine that the correct legal principles no longer make an injunction equitable. Cf. *Thornburgh*, *supra*. Alternatively, even if plaintiffs are correct about the requisite procedural sequence, the Court could overrule *Aguilar* and declare the correct rule of law on review of the denial of a Rule 60(b) motion—namely, that the Establishment Clause does not flatly prohibit public school teachers from delivering remedial education services inside religious school buildings—and, rather than order vacatur of the injunction outright, remand the case to the district courts for further proceedings on petitioners' Rule 60(b) motion, including the taking of any additional evidence by respondents on the question whether the provision of Title I services in religious schools under a particular plan to be implemented by New York City is unconstitutional, albeit in light of this Court's declaration that *Aguilar* is no longer good law. Cf. *Bowen* v. *Kendrick*, 487 U.S. 589, 620 (1988) (upholding statute on its face but remanding for as-applied constitutional challenge). On remand, the district court would then have the authority to conclude that there had been a change in the law, and to vacate the injunction insofar as it prohibits the City from implementing *any* plan for providing Title I services inside religious school buildings.

Court concluded that the rationale of the principal opinion in *Union Gas* had "deviated sharply from [the Court's] established federalism jurisprudence," and that decisions subsequent to *Union Gas* had shown that case to be a "solitary departure from established law," *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1127-1128 (1996). Similar considerations are present here: *Aguilar* was a significant departure from most of the Court's earlier entanglement decisions, and the Court's decisions after *Aguilar* returned to a more practical and restrained approach to the issue of entanglement. Most significantly, the Court's decision in *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), which involved direct financial aid to religiously affiliated institutions, concluded that no danger of undue entanglement had been shown to be inherent in the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.* Thus, the continuing vitality of *Aguilar* should be measured, not just by the separate opinions in *Kiryas Joel* (which explicitly stated that *Aguilar* should be reexamined), but also by full decisions of the Court such as *Kendrick*.

Concerning law of the case, respondents note correctly that appellate courts will generally not entertain legal arguments by losing parties that have been rejected in earlier stages of the litigation. Resp. Br. 22-23 (discussing, *inter alia*, *Illinois* v. *Illinois Cent. R.R.*, 184 U.S. 77 (1902)). But as we have noted in our opening brief (at 42-44), that policy is not based in doctrinal principles of finality of judgments—to which Rule 60(b) is a well recognized exception—but rather in the more flexible jurisprudential rules of law of the case and the "mandate rule" requiring inferior courts to obey the mandates of appellate courts. See *Illinois Cent. R.R*, 184 U.S. at 91. There

is no doubt that, under the law of the case doctrine, this Court has the *power* to reconsider its own earlier decision in the same case. See Gov't Br. 42-43.[3]

The substantial constraints imposed by the doctrines of *stare decisis* and law of the case are sufficient to avert the negative consequences to the courts put forward by respondents as the result of revisiting the *Aguilar* decision in this case (Resp. Br. 23-27). The occasions on which appellate courts reconsider their earlier decisions—whether or not in the same litigation—are few, and will not be

[3] Respondents argue that appellate courts refuse to consider the substance of an underlying judgment when reviewing the denial of a Rule 60(b) motion for abuse of discretion. See Resp. Br. 23 n.8. The cases cited by respondents (*ibid.*), however, did not involve requests for relief from a permanent injunction with prospective effect, and are therefore of little relevance to this case. Respondents also rely on cases stating that courts of appeals will not consider requests to "reinterpret[]" the law when considering requests for modification of consent decrees presented under Rule 60(b). See Resp. Br. 22 n.7 (discussing *Fortin* v. *Commissioner of Mass. Dep't of Public Welfare*, 692 F.2d 790 (1st Cir. 1982)); see also *Coalition of Black Leadership* v. *Cianci*, 570 F.2d 12 (1st Cir. 1978). Those cases, however, were decided before *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), which clarified the standard for modification of a consent decree. Further, requests for modification of consent decrees may present different considerations than do cases like this one, involving injunctions entered after final judgment, since a party entering into a consent decree necessarily compromises some of its entitlement to a declaration of its legal rights and obligations. See *id.* at 389-390. Parties who litigate a case to judgment "know that the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)." *Id.* at 383.

materially increased by the use of Rule 60(b) in this context to grant relief from a permanent injunction. When, as in this case, a decision of this Court is directly controlling, the lower courts will be bound to adhere to that decision, whether the issue arises in the same case in which this Court previously ruled or in another case. In either situation, this Court, in exercising its certiorari jurisdiction, can readily determine whether the argument for reconsideration of the earlier decision is sufficiently meritorious to warrant a grant of review. The courts of appeals, in deciding whether to reconsider their earlier decisions en banc, employ similar considerations. See Fed. R. App. P. 35(a). Thus, when any appellate court is asked to reconsider its earlier precedent, the policies of *stare decisis* and law of the case provide sufficient guidance to ensure that decisions are not lightly overturned.

2. Respondents offer three reasons why the provision of public remedial education services inside religious school buildings violates the Establishment Clause: first, such a program creates a "symbolic union of church and state" in education (Resp. Br. 37-38); second, the program subsidizes the religious functions of the religious school (*id.* at 39-42); and third, there is "no sure way" to prevent public employees on religious school grounds from supporting the religious mission of the private schools (*id.* at 42-45). Those submissions are incorrect.

a. Respondents perceive a danger of symbolic union of church and state in the fact that public and religious school teachers "pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools." Resp. Br. 37-38. They equate

secular public instruction in religious schools with the religious instruction in public schools held invalid in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), contending that both create a danger of "fusion of governmental and religious functions." And they implicitly suggest that the danger of symbolic union is absent under the post-*Aguilar* Title I regime because public school teachers do not cross a doctrinal fence that *Aguilar* places around religious schools.

Although the location of an activity is relevant to the Establishment Clause inquiry into whether there is a "symbolic union of church and state," it is not the controlling factor. A "flat rule" turning on the location of the activity, "smacking of antiquated notions of 'taint,' would indeed exalt form over substance." *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 13 (1993). Rather, when religious activity takes place on public property (or *vice versa*), the crucial question is whether, on all the facts, there is a realistic danger that the objective observer would conclude that the government is endorsing religion. See *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 395 (1993); *Widmar* v. *Vincent*, 454 U.S. 263, 271-272 (1981); see also *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2453-2454 (1995) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2459-2460 (Souter, J., concurring in part and concurring in the judgment); *Board of Education* v. *Mergens*, 496 U.S. 226, 250-252 (1990) (plurality opinion); *id.* at 264-270 (Marshall, J., concurring in the judgment).[4]

[4] Thus, in *Widmar*, the Court stressed that the university had made a forum available to a broad array of groups and would not be perceived as endorsing views expressed in that forum, religious or otherwise. 454 U.S. at 271-272 n.10. In *McCollum*, by contrast, the school made its facilities available for use by religious instructors, but not others. The Court noted in *Widmar* that, in cases like *McCollum*, "the school may appear to sponsor the views of the speaker." *Ibid.*

In the context of Title I services offered in New York, there is little danger of the symbolic union that respondents posit. The majority in *Aguilar* notably did not rest its decision on any conclusion that New York operated Title I as a "symbolic union of government and religion in one sectarian enterprise" (see Resp. Br. 38), and we believe that, "[i]n light of the ample record, the objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools." *Aguilar*, 473 U.S. at 425 (O'Connor, J., dissenting). Unlike the programs challenged in *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985)—which involved public programs offered and available to *all* students at a religious school and woven into the school day of the "typical nonpublic school student," *id.* at 375—Title I services are available only to certain students, in low-income areas and at risk of failing state performance standards, and therefore needing remedial services.[5] Even the impressionable child in

[5] Respondents point out that, in *Ball*, the Court cited Judge Friendly's description of the program at issue in *Aguilar* as a "symbolic union" and "joint enterprise" of government and religion. See Resp. Br. 37-38 (quoting 473 U.S. at 392). This Court did not, however, approve Judge Friendly's description with respect to the facts of the *Aguilar* case itself, but rather with respect to the programs challenged in *Ball*, which involved significantly closer cooperation between public and religious school authorities and integration of their programs.

his or her formative years (see *id.* at 390) would not perceive that remedial instruction as state sponsorship of the religious mission of the private school.

Moreover, the supplementary services provided under Title I are available equally to students in public and private schools, and in practice overwhelmingly benefit public school students. See *Committee for Public Educ. & Religious Liberty* v. *Secretary, United States Dep't of Educ.*, 942 F. Supp. 842, 848 n. 2 (E.D.N.Y. 1996); United States Dep't of Education, *Mapping Out The National Assessment Of Title I: The Interim Report* 16 (1996) (lodged with the Clerk); United States Dep't of Education, *State Chapter 1 Participation and Achievement Information—1993-94*, at 20 (1996) (lodged with the Clerk). There is, accordingly, little danger that Title I would be perceived by the public at large as sponsoring or advancing the religious mission of the religious schools attended by a small minority of the Title I students.

b. Respondents argue that the pre-*Aguilar* Title I program in New York impermissibly subsidized the religious functions of the participating parochial schools. That argument is based in large part on a mistaken description of the program in operation. It also fails to take account of the important safeguards in Title I against use of public funds and teachers to advance religion.

According to respondents, Title I services offered to religious school students in New York were effectively under the control of the religious school because (they contend) religious school students were ineligible to receive Title I services at all if it was impracticable for the Board of Education to send a teacher to their school. Resp. Br. 3, 38-39. The

Secretary's current policy guidance on Title I makes clear, however, that the statutory requirement that students in nonpublic schools be provided services on an "equitable" basis, 20 U.S.C. 6321(a), "applies regardless of the number of children attending a private school." Gov't Br. App. 3a. Thus, when the number of eligible children attending a private school is too small to make it cost-effective to assign those students a teacher, the students may receive Title I services through other means, such as computer-aided instruction. *Ibid.* [6]

Nor is it the case that selection of students for participation in Title I services is controlled by religious school authorities, as respondents suggest (Resp. Br. 3). Title I teachers may and do *consult* students' teachers and principals in selecting students for participation in Title I and in devising programs appropriate to meeting the educational needs of the selected students. That consultation, however, is surely appropriate and necessary to the success of any public-supported remedial program for nonpublic school students. For example, even if a student is statutorily eligible for receipt of Title I

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[6] Respondents also argue that religious schools effectively have a veto over their students' eligibility for Title I services, since "no benefits can be delivered unless their school authorities elect to join a particular program." Resp. Br. 38-39 n.14. Although the Secretary's regulations and policy guidance do not directly address the point, the Secretary reads Title I's requirement of "equitable" services for nonpublic school students to provide that such students would still be entitled to receive Title I services if their parents wanted them to participate in the program, even if the religious schools declined to cooperate, and that local education authorities would be obligated to devise some mechanism for providing such religious school students with "equitable" services.

services, in that the student is failing or at risk of failing state performance standards based on "educationally related, objective criteria" (20 U.S.C. 6315(b)), consultation may make clear that the student's performance problems are aberrational, and that the Title I resources would be better directed towards another student, or that the student in question needs only limited assistance. But the Secretary's regulations make clear that public school officials must make the final decision with respect to delivering services to any particular student. 34 C.F.R. 200.11(b)(3).

Respondents also argue that, as the program operated in New York before *Aguilar*, public school teachers "were assigned to parochial schools on a purely voluntary basis." Resp. Br. 3. It is true that teachers in New York were not compelled to work in a nonpublic school setting, and thus, in that sense, teachers voluntarily worked in nonpublic schools. J.A. 48. Respondents point to no evidence, however, that Title I teachers could or did effectively fill positions by volunteering to work at particular schools or at schools with particular religious affiliations. Even for positions in the Title I program to which teachers applied, the Board of Education made the selection decision employing secular criteria, and the record demonstrates that "the religious affiliation of a teacher * * * ha[d] no bearing on the decision to appoint the teacher to the nonpublic school Title I program or on the assignment of teachers * * * to particular nonpublic schools whose students receive Title I remedial services." *Ibid.* Furthermore, in the pre-*Aguilar* program in New York City, "[n]o teacher or other professional ha[d] sought reassignment to a different nonpublic school * * *

for religious reasons." J.A. 49. And affidavits in the record indicate that "the vast majority of [the teachers] work[ed] in nonpublic schools with religious affiliations different from their own." *Ibid.*

Respondents argue (without citation) that New York's Title I program relieved religious schools of their educational burdens by assuming the task of raising eligible students to grade level, thereby freeing religious school teachers to focus on the rest of the students in their class, who did not need remedial assistance. Resp. Br. 6, 42. It bears emphasis, however, that Title I and its implementing regulations require that Title I services supplement, not supplant, the students' regular classroom education. 20 U.S.C. 6322(b); 34 C.F.R 200.12(a).[7] If private school students receiving Title I services in a particular subject area no longer received regular services

[7] In *Ball*, the Court rejected the school district's argument that the programs challenged there were constitutional because they "supplemented the curriculum with courses not previously offered in the religious schools and not required by school rule or state regulation." 473 U.S. at 396. The Court expressed concern that the argument "would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced a year or two later by a [public-supported] course with the same content." *Ibid.* Title I, however, does not present that danger, for it is a national program offering services only for a "small, identified segment of the student population." *Committee for Pub. Educ. & Religious Liberty* v. *Secretary, United States Dep't of Educ.*, 942 F. Supp. 842, 866 (E.D.N.Y. 1996). The program is not intended to, and does not, provide instruction to all or most students at public or nonpublic schools, and the program is specifically designed to ensure that those schools do not curtail their core efforts of educating their students in order to shift the cost of education to the federal program.

from their school in that area, there would likely be a violation of the statutory and regulatory prohibitions against "supplanting." See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 660-661, 670-671 (1985); *Hawaii Dep't of Educ.* v. *Bell*, 770 F.2d 1409, 1414-1415 (9th Cir. 1985); see also *New York* v. *United States Dep't of Educ.*, 903 F.2d 930, 934 (2d Cir. 1990). Thus, private schools cannot shift to the federal government or the public schools the task of providing students with their education. Cf. *Zobrest*, 509 U.S. at 12 (noting that the religious school "is not relieved of an expense it otherwise would have assumed in educating its students" when a deaf child attending the school is accompanied by state-paid interpreter).[8]

More fundamentally, all of respondents' criticisms of the effects of the Title I program in New York

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[8] *Amici* Americans United for Separation of Church and State, *et al.*, argue (Br. 27) that the Title I statute and regulations do not reveal "whether the parochial schools would have felt obligated to increase their own spending for remedial education in the absence of Title I funding." But in order to ensure that Title I funds do not benefit the private schools themselves, the regulations require that local education authorities may not use Title I funds to supplant services "that would, in the absence of Title I services, be available to participating children in private schools." 34 C.F.R. 200.12(a). Thus, Title I funds may not be used to offer remedial services that private schools would have offered in the absence of such funding.

The same *amici* also argue (Br. 27) that a parochial school that provides remedial education for its own students "is still eligible for Title I funding" so long as it does not reduce any money from its own budget. Private schools, however, are not eligible for Title I funding at all. All funds for services to private school students must remain under the control of a public agency. 20 U.S.C. 6321(c)(1).

before *Aguilar* have little to do with the fact that the services were provided inside religious school buildings, which was the basis for the decision in *Aguilar*. Private and public personnel must consult about the supplementary services appropriate to particular students wherever those services are provided; thus, respondents' submission would require that any program involving such consultation be held violative of the Establishment Clause. Respondents' argument would expand *Aguilar*'s holding to invalidate any provision of Title I services to religious school students, or at least any services that required nontrivial contacts between public authorities and religious school administrators. None of this Court's Establishment Clause decisions supports such an argument, which is contrary to *Wolman* v. *Walter*, 433 U.S. 229, 247-248 (1977) (upholding therapeutic, guidance, and remedial services provided to students off premises of parochial school), and has been uniformly rejected by lower courts (see Gov't Br. 6, 27).[9] "Yet it is difficult to

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[9] By contrast, *amici* American Jewish Congress, *et al.*, suggest that a Title I program delivering services to students inside parochial school buildings would be constitutional if public authorities controlled teacher assignments, curriculum, and the student selection process, and if the classrooms where the instruction occurs were under public control and free of religious symbols. See Br. 19. Putting to one side the details and exact phrasing of the conditions suggested by *amici*, we believe that substantially all of those factors are already required by Title I or the Secretary's current regulations, with the exception of removing religious symbols from the private school classroom. See 20 U.S.C. 6321(c); 34 C.F.R. 200.11(b)(3), 200.13. The Department of Education's current policy guidance does advise that mobile instructional units parked on private school property should be free of religious symbols. See

understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school." *Aguilar*, 473 U.S. at 426 (O'Connor, J., dissenting).

c. Finally, respondents argue that New York's pre-*Aguilar* Title I program was impermissible because there is "no sure way" to prevent public employees teaching inside religious school buildings from supporting the religious mission of those schools. Respondents defend the *Aguilar* ruling as a "prophylactic measure" (Resp. Br. 14, 31, 43) to prevent any potential danger of such support, and submit that it should not be "assumed" that public school teachers and counselors would not, "by reason of their professional training, the details of the Program in question, and the fact that they were under * * * state control," advance the religious mission of the private schools where they teach (*id.* at 30).[10] They also maintain that the danger of such support by public school teachers cannot be prevented by "any workable system of surveillance" (*id.* at 43).

United States Dep't of Education, *Title I, Part A Policy Guidance: Improving Basic Programs Operated By Local Educational Agencies*, Providing Services to Eligible Private School Children 17 (Apr. 1996) (lodged with the Clerk).

[10] Respondents state that public-school teacher professionalism and good-faith should not have been assumed "until there was proof to the contrary." Resp. Br. 30. This suggests that, even under respondents' view, adequate proof of the absence of any realistic danger of conscious or unconscious proselytism should suffice to uphold the provision of Title I services inside religious school buildings.

We disagree with respondents' premise that there is a realistic danger of public-school teacher support of the religious mission of a nonpublic school *whenever* public educational services are delivered by public employees inside religious school buildings. We certainly do not believe that the courts should *presume* that public school teachers will disregard their professional training and their express obligations to remain secular because of their presence in the religious institution. Unlike the payments to religious school teachers struck down in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the state-funded Community Time program struck down in *Ball*, in which the courses were "overwhelmingly taught by instructors who [were] current full-time employees of the parochial school," 473 U.S. at 399 (O'Connor, J., concurring in the judgment in part and dissenting in part), Title I services are delivered by public school teachers who are under public control and are assigned to nonpublic schools without regard to the religion of either teacher or school. The prospect of public-supported religious activity is minimal in such a situation.

Nor does the record suggest any actual danger of wrangling or conflict between public and religious authorities over the content of each other's instruction or the way in which that instruction is given. The entanglement doctrine guards against the interference by government or religion with the affairs of the other sphere. See *Lemon*, 403 U.S. at 614. But as in other aspects of Establishment Clause jurisprudence, the "measure of constitutional adjudication" in entanglement cases is the distinction "between real threat and mere shadow." *Marsh* v. *Chambers*, 463 U.S. 783, 795 (1983) (quoting *School*

Dist. of Abington v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). When secular educational services are delivered by public employees under public supervision, using funds that remain at all times under the control of a public agency, there is, again, little reason to *presume* that public authorities will attempt to supervise the conduct of the church, or that religious authorities will seek to influence the content of the public curriculum. If such a problem actually arises in a particular case, then the courts can address that problem appropriately. See *Kendrick*, 487 U.S. at 621-622. But the rule of *Aguilar*, flatly forbidding public school teachers from entering religious school buildings to give remedial education, is much broader than necessary to safeguard the liberty protected by the Establishment Clause.

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For the foregoing reasons, and for those set forth in our opening brief, the Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be overruled. Accordingly, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the injunction.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

APRIL 1997